On the liability of the occupier of a tenement for damage done to that of a neighbour, by fire kindled through his own or his servant's negligence. By C. J. BUNYON, Esq., M.A., Barrister-at-Law.

THE question as to the liabilities arising upon the destruction of property by a fire which has originated through negligence, is one of considerable importance, both to the public and to Insurance Offices; and as it appears that the vulgar notions afloat upon it, by no means tally with the law, and have, nevertheless, their origin in no less an authority than that of Sir William Blackstone, it may be a matter of interest to the readers of this magazine to investigate the subject.

By the common law, every master of a house or chamber was bound so to keep his fire as to prevent it from occasioning injury to his neighbours and others. If a fire broke out in a house and burnt the adjoining dwelling, or did other damage, the master of the house in which the fire began was liable to make compensation for the injury, and it was not necessary to prove negligence, which the law presumed. Thus, "If my fire by misfortune burns the goods of another man, he shall have his action on the case against me."—"If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods and also my neighbour's house, he shall have his action on the case against me."—"So, if the fire is caused by a servant or guest, or any person who enters the house with the consent of the pater familias, but not when kindled by a stranger who enters his house against his will." And the custom extended not only to fires commencing in dwelling-houses, but also to a fire lighted in an adjoining close.* By the statute, 6th Anne, c. 31, however, after imposing a severe penalty upon a servant by whose negligence a fire occurred, it was enacted "that no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered or occasioned thereby." And this provision was made perpetual by the 14th Geo. 3, c. 78, which enacts "that no action shall be brought against any person in whose house, chamber, or other building, or on whose estate any fire shall *accidentally* begin, any law, usage, or custom to the contrary, notwithstanding." Upon this statute, then, the question arises as to the meaning of the word "accidentally," whether it was intended to alter the law in all cases where the fire is not wilful, or only in those in which the cause is unknown, or no negligence can be proved. The former appears to have been the construction generally accepted, and hence it happens that the reports are singularly barren of decisions upon this point; two modern cases have, however, occurred, by which it may be considered to be settled in favour of the latter. In one of these (Viscount Canterbury, *v.* the Attorney-General, 1 Phill. 306), which was a petition of right, the point at issue was the liability of the Crown to make good the loss sustained by the Speaker of the House of Commons upon the destruction of the Houses of Parliament, when the fire was caused by the negligence of the servants in burning the tallies in improper places. The question was discussed at length by

* Com. Dig. Action on case A. 6, where the authorities are collected.

Lord Lyndhurst in his judgment: he remarked, "Sir W. Blackstone, in his Commentaries (Vol. I., p. 431), observes, that by the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burnt down, thereby an action lay against the master, but now, he says, by the statute 6th Anne, c. 31, the common law is altered. He thus states it distinctly as his opinion, that for a fire in a dwelling-house originating in the negligence of either himself or his servant, the master is not responsible; no authority, indeed, or decision is referred to, in support of this opinion, nor does the learned author explain how this construction of the act is to be reconciled with the words, 'shall accidentally begin;' but, although this work has gone through many editions, and been subjected to much criticism, no observation that I can find has ever been made upon this passage, or any objection urged against it;" and, he added, "during a long professional life, I recollect no instance of an action having been brought to recover compensation for this species of injury, nor do I find in the books any trace of such a proceeding." The decision, indeed, in this case, turned upon another point, but there can be no doubt as to the opinion of his lordship, and that he considered the true construction of the statute and its operation upon the land to be, that the master of the house being by the common law responsible in the event of accident, and only excused by showing on his part that the calamity arose from some superior cause which he could not resist or control: the object of the legislature was to correct this anomaly, and to put the law in this respect on the same footing as the general law of the country, namely, that the party should be responsible only upon proof that the fire was occasioned by actual negligence either of himself or his servants.

This view is confirmed by the second case (Filliter v. Phippard, 12 Jurist 203), where it was held that notwithstanding the statute, an action on the case lies against the owner of a close, for negligently lighting in it a fire, which spreads to his neighbour's close; and Lord Denman, in delivering the judgment of the court, and after stating the former law, the statute, and Sir W. Blackstone's position, observed "This reason of Sir W. Blackstone's, viz. that their own loss is sufficient punishment for their own or their servants' carelessness, is not stated in the act, and must be allowed to be very far from satisfactory, because the principle on which actions are maintained is not the punishment of guilty persons, but compensation to innocent sufferers: besides, making servants punishable for fires resulting from their own negligence is no exemption of their masters from responsibility for the same faults, for fires which accidentally begin are not fires produced by negligence; it would therefore appear that Blackstone had drawn a conclusion from the enactment which it by no means sustains. It is true that in strictness the word accidental may be employed in contradistinction to wilful; and so the same fire might both begin accidentally and be the result of negligence; but it may equally mean a fire produced by mere chance, or incapable of being traced to any cause, and would stand opposed to the negligence of either servants or masters; and when we find it used in statutes which do not speak of wilful fires, but make an important provision

with respect to such as are accidental, and consider how great a change in the law would be effected, and how great an encouragement would be given to that carelessness, of which masters may be guilty as well as servants, we must say that we think the plaintiff's (that is the latter) construction much the most reasonable of the two."

The result as between an insurance office and its insurer, whose property has been destroyed through the negligence of the latter or his servants, will not be in anywise to alter their relative position, as it is firmly settled that the office is still liable to make good the loss, that very negligence by which it has been occasioned being one of the principal risks to guard against which is the object of the insurance. But where the fire has spread, and other property belonging to other persons has been destroyed, many questions will arise. Thus in the case of two buildings insured in different offices, although each office will be liable to indemnify its own insurer, yet it is apprehended that where negligence has been the cause of the fire, the owner of the building in which it has commenced will be primarily liable to the owner of the other, and that even if the office should pay the claim of such lastly mentioned person, yet it will be entitled (as in the well-known case where property is fired by the sparks from a railway engine) to bring an action in his name. A corresponding equity will in like manner arise in favour of an office in which both properties may happen to have been insured, under similar circumstances. This question of negligence will of course in every case be a question for a jury to decide, as upon the proof of it the liability will altogether depend; cases, however, may be easily imagined in which the proof may be easy, although the party to be charged may be personally guiltless, as where the fire has occurred through the admitted negligence of a servant.

Hence it appears that although a man may have insured his own property to its full value, he may yet become a loser to a considerable extent, in the event of a fire occurring, by being compelled to indemnify his neighbour. Whether the insurance offices may ever choose to enforce this equity in their own favour will be a question for their own decision, and one which will probably be viewed in a mercantile rather than in a legal light; but as there is nothing to prevent a private individual from exercising the right, it may become a question whether the liability is not one which may itself be guarded against by insurance. The only obstacle indeed appears to be found in the duty, which would fall as heavily upon an insurance of this limited character, as upon those of an ordinary description. In France, where the law, founded upon the provisions of the Code Napoleon (Liv. III. ss. 1383-1384, 1733-1734) does not apparently differ in any great degree from the rules of our common law, the corresponding but much more extensive risk is, it is believed, to a very considerable extent covered by an appropriate insurance. (Toullier—Droit Civil Francais, Tome XI—211.)